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IN THE

Supreme Court of the United States

No. 71-531

LESTER CLIFFORD LEE, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on September 14, 1971.

OPINIONS BELOW

The opinion of the Court of Appeals, dated June 24, 1970, is officially reported in 428 F. 2nd 917 (1970) and is set out in the Appendix, *infra,* pp. 1a-10a.

The opinion of the Court of Appeals dated September 14, 1971 is unreported, and is set out in the Appendix, *infra,* pp. 15a-16a.

JURISDICTION

The judgment of the Court of Appeals was entered on September 14, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATEMENT OF THE CASE

On June 12, 1968, petitioner Lester Clifford Lee was stopped and arrested while traveling on Highway Interstate 75 at or near Fort Mitchell, Kentucky by agents of the Alcohol, Tobacco and Firearm Division of the Bureau of Internal Revenue, Kentucky State Police and Fort Mitchell City Police without a warrant for his arrest nor while in violation of any city, state or federal law, except on the assumption that petitioner was violating a federal law, i.e. an assumption that he was transporting in interstate a firearm after having been previously convicted of a crime punishable by imprisonment for a term exceeding one year (*15 U.S.C., Sec. 902(e)*) as amended October 3, 1961. The assumption of a violation was predicated upon the telephone *tip* of an informant.

On the morning in question certain agents of the Alcohol and Tobacco Tax Division received a telephone call from an unnamed informer who reported that defendant and a companion were starting an automobile trip from Columbus, Ohio and would proceed through Kentucky by way of I-75. With this information, the agents stationed themselves along I-75. They were in radio contact with other agents stationed on the Kentucky side of I-75. At Fort Mitchell, Kentucky, the agents forced the defendant's automobile off the road and searched the car. They found a 38 caliber Colt revolver in a suitcase which was in the trunk and four counterfeit $100.00 federal reserve notes which

were under the floormat on the passenger side of the front seat of the car. At some point of time after the discovery of these items the defendant and his codefendant were arrested. Said search of the automobile and the arrest were made without warrants. At the preliminary hearing before the United States Commissioner, defendants objected to the evidence which consisted of the fruits of the search. The Court disallowed the objection and admitted the gun and $100.00 bills into evidence.

On the 1st day of October, 1969, Counsel for defendants were in Court on motions to suppress filed by defendant Stilson and motion to dismiss count I of the Indictment filed by defendant Lee. The Court conducted an evidentiary hearing on the motion to suppress and after hearing the evidence overruled the motion. The Court also overruled Lee's motion to dismiss count I of the indictment. Subsequently, prior to trial, petitioner moved the Court to sever the Counts of the indictment and this motion was overruled. Just prior to trial this motion was renewed and again overruled.

During the presentation of the government's case at the trial, the court admitted into evidence, over objection: (1) The 38 caliber revolver; (2) The four $100.00 counterfeit notes; (3) an alleged copy of the court martial conviction record of petitioner; (4) Testimony to the effect that the gun found in defendant's trunk was stolen.

At the conclusion of the government's case, defendant moved for a verdict of acquittal on count I of the indictment on the grounds that a court martial conviction is not a conviction within the meaning of Title 15,

Sections 902(e) and (f). This motion was overruled by the Court. The defendant then moved for a verdict of acquittal on Count III of the indictment for the reason that the government failed to prove a prima facie case sufficient to be submitted to the jury on the question of an intent to defraud. This motion was also overruled by the Court. All motions were renewed at the close of defendant's case and were also overruled. The jury returned verdicts of guilty as to two counts of the indictment and the Court sentenced the defendant to five (5) years imprisonment on each of the two counts, said sentences to be served concurrently. From the verdict, judgment and sentence, defendant perfected his appeal to the United States Sixth Circuit Court of Appeals.

It is conceded by both the government and petitioner that the conviction upon which the government relies was for a violation of Articles of War 92 and 93 occurring on the 13th day of May, 1949, on the allied occupation held island of Okinawa. Said conviction was for carnal knowledge and sodomy.

Upon consideration of petitioner's appeal, the Sixth Circuit Court of Appeals in its opinion held that there was no reversible error in the trial itself and refused to grant a new trial. The Court, however, remanded the case with instructions to the District Court to conduct a hearing consistent with its opinion to determine whether probable cause for the arrest existed and to hear and determine the petitioner's motion for a new trial on newly discovered evidence. The Appellate Court ordered the District Court to report its findings on the issue of probable cause for the arrest.

The District Court subsequently conducted a hearing without a jury concerning the reliability of the undis-

closed informant and heard evidence in support of the motion for a new trial.

The Court, after hearing the evidence, reaffirmed the finding of probable cause for the arrest.

During the presentation of evidence, the petitioner produced evidence that an Ohio Bell Telephone Company employee had told two of petitioner's witnesses that he had tapped the telephone of petitioner and had been told that the tap led to petitioner's arrest. Said telephone employee refused to testify to any such conversation, pleading the Fifth Amendment protection against self-incrimination. During the hearing, counsel for petitioner moved the Court to conduct an in camera proceeding for the purpose of determining the source and circumstances by which the informant acquired his information. The Court overruled this motion. The petitioner also moved the Court and Government to grant the telephone employee immunity from prosecution in order that he give testimony relative to the telephone tap. This motion was overruled.

After the District Court's findings were forwarded to the United States Court of Appeals, the Appellate Court affirmed the conviction of petitioner.

QUESTIONS PRESENTED

(1) Whether prejudicial error resulted from petitioner's conviction in the Federal District Court on two counts of an indictment which charged him in the first count with transporting a firearm in interstate commerce after having been convicted of a crime punishable by more than one year in violation of 15 U.S.C. section 902(e), and in the third count with possessing

and concealing counterfeit money with intent to defraud, in violation of 18 U.S.C., section 472 where

(a) Petitioner was denied separate trials upon the counts from which conviction resulted where the first count involved evidence of a prior conviction which was prejudicial to petitioner with respect to his conviction on the third count, and where the petitioner, during the course of the trial, was denied the opportunity to testify as to one count and not the other.

(b) The element of prior conviction as required by Section 902(e) of the United States Code was met through a showing of petitioner's conviction in 1949 by a Court martial under the informal procedure then and there prevailing in the armed forces.

(c) The trial court permitted testimony to the effect that the firearm in question was stolen, when such fact was not material to any element of any crime charged in the indictment, and said fact resulted in prejudice to the petitioner.

(d) Evidence was admitted, over objection, which resulted from a search of appellant's automobile and seizure of said evidence without probable cause, said cause not being properly supplied by a hearing subsequent to the trial as ordered by the Federal District Court.

(2) Whether a combination of the foregoing errors resulted in the denial of a fair trial as required by the Fifth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment IV

Unreasonable searches and seizures.—The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V

Criminal actions — Provisions concerning — Due process of law and just compensation clauses.—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

15 U.S.C. section 902(e)

It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

18 U.S.C. section 472

Uttering counterfeit obligations or securities.—Whoever, with intent to defraud, passes, utters, publishes, or sell, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both. (*June 25, 1948, c. 645, section 1, 62 Stat. 705*)

SUMMARY OF ARGUMENT

A study of the following arguments in favor of a writ of certiorari, with particular emphasis to the last several paragraphs in each subsection, indicate that the decision of the Court below leaves much to be desired with respect to uniformity of decisions and creates substantial questions of Constitutional law which remain unanswered.

The confusion in the law which arises from a comparison of the Drew Case with the instant case is apparent. The Drew case recognizes the prejudice which arises when two counts are joined wherein the prosecution is offering proof of prior convictions as an element to one offense, to the prejudice of another unrelated offense being simultaneously tried. In Federal Courts, this constitutes a violation of petitioners constitutional right to due process under the Fifth Amendment to the United States Constitution. Furthermore, the prejudice is compounded when, as in the instant case, petitioner is denied the right to testify as to one count, but not as to the other. The law with respect to Fifth Amendment rights should be defined by this Court in order to caution trial courts against automatically

joining all counts, or charges, arising out of the same transaction, without respect to whether prejudice will outweigh expediency.

A further major issue involving rights of due process concerning the question of whether a court martial conviction under the Articles of War is a conviction within the meaning of Title 15, section 902(e) of the United States Code. Petitioner contends that Section 902 contemplates a conviction in a case wherein the constitutional protections are afforded. In 1949, and under the Articles of War, court martials were informal, and primarily designed to enforce discipline rather than expedite justice as defined by the Constitution. The many ex-servicemen who were subjected to military justice in this manner, having lead useful lives for many years, may now be subjected to criminal prosecution under one of the many new gun control acts in a manner never intended by Congress. The sole authority on this issue appears to be the instant case.

The issue of improper search and seizure was recognized by the Court below, but the ultimate result of its decision was to permit the unidentified informant to utilize illegal wiretap in a manner not permitted by law enforcement agents. The result is a circumvention of safeguards provided under the Fourth Amendment to the United States Constitution. It further permitted the trial court to determine probable cause after conviction, notwithstanding the fact that timely objection to lack of probable cause was made at all stages of the proceedings.

A writ of certiorari is further justified where, as in this case, there is an utter lack of evidence showing that the possession of counterfeit federal notes was coupled

with the intent to defraud, pursuant to the language in 18 U.S.C. section 472, the conviction of petitioner is in violation of his right to due process under the Fifth Amendment to the United States Constitution.

ARGUMENT

1. Certiorari Should Be Granted Because the Decision of the Court Below, Upon the Issue Set Forth in (1) (a) of Questio... Presented Is in Conflict With the Decision in Cross v. United States, 335 F. 2d 987, 989 (D. C. Cir. 1964)

Rule 8(a) of the Federal Rules of Criminal Procedure permits the joinder of two or more offenses when they are of the same or similar character or are based on the same act or transaction.

Under the authority of Rule 8(a), the government joined counts I and III of the indictment against Petitioner. However, prior to trial, petitioner on two occasions moved the Court to sever for trial the two counts for the reason that due to the peculiar nature of Count I, the prior record of petitioner would be admissible into evidence whereas if the remaining count were tried alone, such record would not be admissible unless the petitioner took the witness stand, which he did not elect to do.

Rule 14 of the Federal Rules of Criminal Procedure provides that if it appears that a petitioner or the government is prejudiced by a joinder of offenses in an indictment, the court may order an election or separate trials of counts or provide whatever relief justice requires. It is petitioner's contention that due to the nature of the offense of transporting a firearm interstate by one who has been previously convicted of crime it is one of the few cases where refusal to sever the counts constitutes prejudicial error.

Generally, the test for whether joinder is proper involves a weighing of the possible prejudice to the petitioner from joinder against the public interest in avoiding duplicitous, and time consuming trials in which the same factual and legal issues must be litigated. *United States* v. *Haim,* 218 F. Supp. 922 (S.D. N.Y. 1963); *United States* v. *Teemer,* 214 F. Supp. 952 (N.D. W.Va. 1963).

In *Cross* v. *U.S.,* 335 F. 2d 987 (D.C. Cir. 1964), and *Drew* v. *U.S.,* 331 F. 2d 85 (D.C. Cir. 1964), the Court held that it is elementary that previous convictions are not admissible in evidence against a petitioner unless he chooses to take the witness chair and be cross-examined as to both counts of the indictment.

In the present case the petitioner herein offered himself as a witness as to count III of the indictment, but the Court ruled that if he took the stand he could be cross-examined as to both counts contained in the indictment. As a result, the petitioner chose not to testify.

It is stated in *5 Wharton, Criminal Law and Procedure, sec. 1939 (12th ed. 1957),* that two of the most compelling reasons for granting the petitioner the right of severance without any specific showing of prejudice are:

(1) Undue limitations on the petitioner's right to testify in his own behalf. In *Cross* v. *United States,* 335 F. 2nd 987, 989, the Court noted.

> "Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. His decision whether to testify will reflect a balancing of several factors with respect

> to each count: The evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced in testifying on the count upon which he wished to remain silent."

The court reasoned that in a separate trial of the counts the jury would not have heard his admissions of prior convictions and unsavory activities; nor would he have been under duress to offer dubious testimony on that count in order to avoid the damaging implication of testifying on only one of the two counts. The only effective remedy is to give the petitioner an absolute right to severance before trial.

(2) Prejudice through introduction of evidence which fails to meet the other crimes test.

Evidence of other crimes is admissible when relevant to (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other, and (5) the identity of the person charged with the commission of the crime on trial.

In *Drew* v. *United States,* 331 F. 2d 85, 90 (D.C. Cir. 1964), the court concluded that the defendant had been prejudiced because he was required to stand trial

on two separate robberies at the same time. Had the defendant been prosecuted on each robbery separately, the evidence of the other crime would not have been admissible under the other crimes rule. Thus, by joining the unrelated offenses together for trial, the prosecution brought about the evil to be avoided by the general rule that evidence of other crimes is not admissible due to the likelihood that juries will make improper inference. *See note 74 Yale L.J. 553, 556-57* (1965)

In the instant case it is obvious that the jury was unfairly influenced by the evidence which showed that petitioner has been court martialed for rape and sodomy in 1949. If petitioner would have gone to trial on Court II above, such evidence would not have been admissible.

In view of the above argument, it seems that in some instances, persons accused of several offenses in a single indictment may be denied the right of a fair trial; that while expediency in the judicial process is desirable on the one hand, it should not be so imposed as to result in conviction based upon previous unrelated offenses, rather than relevant and competent evidence of the crime for which a defendant stands accused. It is therefore important that the Supreme Court decide this issue, due to the basic philosophy of fair trials in a free society and because there presently exists within our trial courts an attitude that all offenses arising from the same transaction are properly joined in all cases, without regard to the prejudice which may develop or the untenable position in which an accused may be placed when he desires to testify in his own behalf as to one or more of the charges. This is especially true in situations where the unfairness is so obvious before trial, as was the case here.

2. Certiorari Should Be Granted Because There Exists a Substantial Question of Constitutional Law as to Whether a Conviction by a Court Martial Under the Procedure Existing in 1949 Is a Conviction Within the Meaning of Title 15, Section 902(e) of the United States Code.

Prior to trial, the petitioner filed a motion to dismiss Count I of the indictment for the reason that a court martial conviction is not a crime within the meaning of Title 15, Section 902 of the United States Code and therefore this count did not state facts sufficient to constitute an offense. To state the matter succinctly: Is a court martial "conviction" a conviction of a crime within the meaning of section 902(e) of the statute? It is the contention of petitioner that "conviction" as used in this Section relates only to convictions in a state or federal court as distinguished from a military court in 1949, trying persons within its jurisdiction under the Articles of War and without trained counsel, jury or procedural safeguards.

There can be little doubt that a distinction exists. In *Toth* v. *Quarles,* 350 U.S. 11, 100 L. Ed. 8, 765, Ct. 1, Justice Black speaking for the United States Supreme Court stated:

> "We find nothing in the history or constitutional treatment of military tribunals which entitles them to rank along with Article III courts as adjudicators of the guilt or innocence of people charged with offenses for which they can be deprived of their life, liberty or property. Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to our army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic

fighting purpose of armies is not served, and conceding to military personnel that high degree of honesty and sense of justice which nearly all of them undoubtedly have, it still remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts. For instance, the Constitution does not provide life tenure for those performing judicial functions in military trials. They are appointed by military commanders and may be removed at will. Nor does the Constitution protect their salaries as it does judicial salaries. Strides have been made toward making courts-martial less subject to the will of the executive departments which appoints, supervises and ultimately controls them. But from the very nature of things, courts have more independence in passing on the life and liberty of people than do military tribunals.

"Moreover, there is a great difference between trial by jury and trial by selected members of the military forces. It is true that military personnel, because of their training and experience, may be especially competent to try soldiers for infractions of military rules. Such training is no doubt particularly important where an offense charged against a soldier is purely military, such as disobedience of an order, leaving post, etc. But whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence in federal courts is that laymen are better than specialists to perform this task. This idea is inherent in the institution of trial by jury. "Juries fairly chosen from different walks of life bring into the jury box a variety of different experiences, feelings, intuitions and habits. Such juries may reach completely different conclusions than would be reached by specialists in any single field. On many occasions, fully known to the

> Founders of this country, jurors—plain people—have manfully stood up in defense of liberty against the importunities of judges and despite prevailing hysteria and prejudices. The acquittal of William Penn is an illustrious example. Unfortunately, instances could also be cited where jurors have themselves betrayed the cause of justice by verdicts based on prejudice or pressures. In such circumstances judges have a most important place under our constitutional plan since they have power to set aside convictions."

Conviction of a crime means conviction had as a result of trial in a criminal action prosecuted by the state. (*Leland* v. *Kansas State Bd. of C. Examiners,* 270 P. 2d 255; See also 14 Am. Jur. p. 759 and 18 C.J.S. Conviction p. 98). And it includes a conviction not only in a state court but also in a federal court. (Application of Marino, 42 A. 2d 469). Court martials are distinct in their nature from civil tribunals; the power vested in the military courts is not a part of the judicial power of the United States within the framework of the Constitution and such courts simply are not within the judicial branch of our government. (6 C.J.S. p. 440); *Reilly* v. *Pescor,* 156 F. 2d 632; 36 Am. Jur. 244; 351 U.S. 470; 46 S. Ct. 886; 100 L. Ed. 1342).

In *Gubbels* v. *Del Guercio,* 9th Cir. Cal., 261 F. 2d 952, the Court in reversing the District Court held that convictions in a military court were not contemplated by the Sections providing for the deportation of aliens convicted of two crimes involving moral turpitude and the court said that military tribunals are not constituted in such a way that they can have the same kind of qualifications that the constitution has deemed essential to fair trial of civilians in Federal Courts and that not all of the constitutional guarantees extended to defendants prosecuted in civil courts are available to an accused tried by a military tribunal. In effect the court

said that a conviction by a military tribunal while serving in the United States Army was not a "conviction" within the meaning of the Statute.

It may be concluded that there exists, by judicial interpretation, a distinction between convictions obtained in a military court and convictions obtained in state or federal courts. The court below held that for the purpose of the statute upon which the petitioner's conviction was based, this distinction did not apply. In making this decision, the court below did not indicate any basis for such a result. There has been a recent expansion of regulations applicable to those persons who have been previously convicted of a crime. It is therefore important at this time to define the type of prior conviction meant by such a law in order that there exist a uniform and predictable basis for state and federal courts to provide enforcement.

There are many persons who served in the armed forces during time of war, and court martialed under the Articles of War. Such convictions were obtained expediently, many times without counsel, without jury, without appeal, and during a time in which discipline was practically the sole purpose of military justice. Under the Federal Gun Control Act of 1968, an individual so convicted in the confusion of wartime, and regardless of the fact that he has been a useful and productive citizen for many years, may find himself charged with a federal crime for an innocent hunting expedition, or for having a shotgun stored in his closet.

The importance of this issue is not Lester Clifford Lee, but the many persons who may thus be affected by federal criminal statutes in a manner not intended by Congress. For these persons and for the issues raised by such statutes, this court should grant certiorari.

3. Certiorari Should Be Granted Because the Decision of the Court Below in Affirming a Warrantless Search Under the Circumstances Shown by the Evidence Is in Conflict With the Following Cases: Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108, 114-115 (1964); United States v. Jeffers, 342 U.S. 48, 51 (1951); Johnson v. United States, 333 U.S. 10, 13-15 (1948); Beck v. Ohio, 379 U.S. 89 (1964)

Petitioner was traveling in an automobile interstate on I-75 and was stopped by federal agents who were acting on information from an informer who had telephoned one of the agents at his office in Cincinnati, Ohio. At the time the agent talked with the informer he did not know his identity or verify his reliability. The officer further testified that the United States Commissioner was not available to issue a warrant. These agents, after stopping the petitioner's automobile, conducted a warrantless search of said automobile and found a gun in a suitcase situated in the trunk of the car. They also discovered four counterfeit $100 federal reserve notes under the floormat of the passenger side of the front seat. The government contends that the search and seizure were constitutionally valid on the grounds that they were incident to a warrantless arrest which was in turn based upon probable cause that a felony was being committed. The government further contended that the facts and circumstances which created the basis for probable cause consisted of information received via telephone from an informer whose identity at the time was unknown to the agent recipient. It is petitioner's contention that the evidence showed that the agent who received the "tip" had no means of knowing or determining the reliability of the informant or his information which purportedly formed the reasonable grounds for probable cause which in turn led to the warrantless arrest, search and seizure.

The general rule is that a search and seizure are constitutionally reasonable if made under the authority of a valid search warrant. *Stoner* v. *California,* 376 U.S. 699 (1964). If the search and seizure are not made under a valid search warrant, they must fall within one of the exceptions to the general rule. That is, they must be made:

(a) Incident to arrest (150 N. W. 2d 621) 1967.

(b) With consent (*Katz* v. *U. S.,* 389 U. S. 347) 1967.

(c) In an emergency (*Warden* v. *Hayden,* 387 U.S. 294) 1967.

One of the exceptions to the general preference of search with a warrant is that a search and seizure may be made without a search warrant "incident" to a lawful arrest. *Parnell* v. *State,* 204 So. 2d 910 (Fla. App. 1967). The burden is upon the government to come within the exceptions to the warrant requirement. *United States* v. *Jeffers,* 342 U.S. 48, 51 (1951).

A search incident to an arrest, like all other searches and seizures, must be reasonable. *People* v. *Gonzales,* 356 Mich. 247, 97 N.W. 2d 16 (1959). As a general rule, a search and seizure incident to arrest are reasonable if the following requirements are met:

(A) The arrest must be lawful. *Beck* v. *Ohio,* 379 U.S. 89 (1964).

(B) The search must be incident to the arrest.

1. In purpose. *Preston* v. *U.S.,* 376 U.S. 364 (1964)
2. In time
3. In place
4. In scope. *U.S.* v. *Rabinowitz,* 399 U.S. 56 (1950).

Probable or reasonable cause is the most important concept of the law of arrest. What constitutes probable cause requires inquiry into the circumstances confronting the officer at the time of arrest. *People* v. *Alvarado,* 58 Cal. Reptr. 822 (Ct. of App. 1967); *People* v. *Harper,* 365 Mich. 494 (1962).

If the facts and circumstances before the arresting officer are such as to warrant a man of prudence and caution in believing the offense has been committed, it is sufficient. *Carroll* v. *U.S.,* 267 U.S. 132 (1925).

The quantum of evidence necessary to establish probable cause does not require proof of guilt, but it cannot be established by suspicion alone. *Henry* v. *U.S.,* 361 U.S. 98 (1959). The quantum of information which constitutes probable cause is evidence which would warrant a man of reasonable caution in the belief that a felony has been committed. *Carroll* v. *U.S.,* 267 U.S. 132 (1925); *Wong Sun* v. *U.S.,* 371 U.S. 471 (1963); *People* v. *Harper,* 365 Mich. 404 (1962).

The validity of an arrest and search incidental thereto is expressed concisely in *Beck* v. *Ohio,* 379 U.S. 89 (1964):

> "The Constitutional validity of the search . . . must depend upon the constitutional validity of petitioner's arrest. Whether the arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing as offense."

The courts have taken judicial notice that criminals use automobiles in the commission of their crimes, but

have also taken notice that there are thousands of law-abiding persons who do likewise. *Carroll* v. *United States,* 267 U.S. 132 (1925). The stopping of an automobile must be reasonable, i.e. based upon probable cause; thus, an officer may not stop an automobile because he is suspicious and demand to see the driver's license and search the car. *People* v. *Reed,* 227 N.E. 2d 69 (Ill. 1967).

The reliability of the informer must be established and the fact that the informer's information turned out to be correct is of no consequence. *People* v. *Horowitz,* 21 N.Y. 2d 55. Information from an unknown source unverified, is not of itself probable cause. *Potter* v. *U.S.,* 362 F. 2d 493 (1966).

It would seem that if disclosure of the informer is ever to be required, it would be so in cases where independent evidence was so insubstantial that in essence the existence of probable cause depends solely upon the reliability of the informer. See *Roviaro* v. *United States,* 353 U.S. 53 (1957); *United States* v. *Tucker,* 248 F. Supp. 915, 16; *Robinowitz* v. *United States,* 399 U.S. 56 (1950).

In the case of *People* v. *Malinsky,* 225 N.E. 748, the government declined to name the informer, offered no evidence of his reliability, and failed to produce any other evidence of probable cause. The Court held that the searches incidental to the arrest are illegal and the convictions do not rest upon established guilt beyond a reasonable doubt. The informant must be shown to be reliable. *People* v. *McCray,* 210 N.E. 2d 161 (1967); *McCray* v. *Ill.,* 87 S. Ct. 1056. The informer has the same second class standing in this context that he does as a source of information on which a search warrant or an arrest warrant can issue. Before the information

from the informant will suffice as a basis for probable cause it is necessary to establish the basis for the officer's belief that the informer's information is reliable. If that reliability is established, then the arrest will be upheld as valid. *McCray* v. *Ill.*, 386 U.S. 300 (1967); *Draper* v. *United States,* 358 U.S. 307 (1959); *People* v. *Marquez,* 66 Cal. Reptr. 615 (Ct. App. 1968); *People* v. *Wilson,* 8 Mich. App. 651, 155 N.W. 2d 210 (1968); *State* v. *Begar,* 158 N.W. 2d 501 (Minn. 1968); *State* v. *Deltinar,* 77 N.M. 497, 424 Pac. 2d 783 (1966). The prosecution must prove the trustworthiness and basis of the hearsay, 216 Fed. Supp. 41. In other words what did the informant base his conclusions on. *Aguilar* v. *Texas,* 84 Sup. Ct. 1509 (1964). Hearsay may provide probable cause necessary for an arrest without a warrant if substantial basis for crediting the hearsay is presented.

The initial decision of the court below recognized that probable cause had not been shown. The court therefore remanded the case to the trial court with instructions to conduct a hearing to determine probable cause for the search and seizure and also to hear and determine a motion for a new trial based upon newly discovered evidence. The trial court conducted the hearing and found probable cause for the search and seizure based upon testimony that the informer had given reliable information in the past. Petitioner's motion for new trial based upon newly discovered evidence was closely related to the search and seizure issue. This evidence tended to show that the informant, who remained unknown, obtained his information through an illegal wiretap which was set up by one Frank Spires, an employee of the telephone company. Although Spires refused to testify, claiming the protec-

tion of the 5th Amendment, two other witnesses testified that Spires admitted to them that he made the wiretap which resulted in petitioner's conviction. Notwithstanding this evidence the search and seizure was ruled as being proper and the Court below affirmed, holding that the counterfeit bills and firearm which was the subject of conviction had been properly obtained.

The questions raised are as follows:

(1) May probable cause as to search and seizure be found at a hearing after conviction in lieu of granting a new trial?

(2) Was probable cause for the search and seizure in the instant case ever shown?

(3) May illegal wiretapping be a sufficient basis for search and seizure of evidence subsequently used to convict an accused?

The issue involving illegal wiretapping is perhaps the strongest basis for granting certiorari. Since wiretapping is illegal, the direct evidence obtained therefrom is inadmissable. This safeguard is meaningless, however, if informants or law enforcement agents are permitted to use illegal wiretap for the purpose of obtaining evidence which would ordinarily be admissable, were it not for the illegality of the original source. Wiretapping is condemned, not because it is unreliable, but because it is manifestly against public policy as being akin to a device of the police state. That which is condemned should not be indirectly condoned. The court below affirmed the conviction upon the basis that, in its opinion, petitioner had not presented sufficient evidence to (conclusively) show the use of illegal wiretapping. This ignores the basic secretive nature

of wiretap particularly when shielded by an unidentified informant. Under these circumstances, the evidence was more than sufficient to show the use of illegal wiretap.

Since the issue of illegal wiretapping is so critical in a free society, certiorari should be granted in order to determine its proper place with respect to informants. Should the conviction of petitioner stand, any policeman could be designated as an "informant" by another policeman, and thus be free to wiretap, in contravention of law and in flagrant violation of public policy.

4. Violation of Title 18, Section 472 Requires an Intent To Defraud

Title 18, Section 472 provides that:

> "Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both".

The elements of the offense under the above section as the same pertains to defendant's case, would appear to be:

1. Possession and/or concealment of counterfeit notes.
2. Knowledge that said notes were counterfeit.
3. An intent to defraud.
4. Venue.

There can be no question that the element of knowledge that the bills are counterfeit is a necessary element of the crime of passing and/or possessing counterfeit bills with an intent to defraud. *U.S.* v. *Brown,* C.A. N.Y. 1965, 348 F. 2d 661; *Marson* v. *U.S.,* C.A. 6th Cir. Mich. 1953, 203 F. 2d 904; *Hagan* v. *U.S.,* C.C.A. Ohio 1924, 295 F. 656.

Section 472 U.S.C. expressly and unequivocally states that in addition to possessing counterfeit bills with knowledge that the same are counterfeit, there must be the additional element of an "intent to defraud", and in prosecutions under this section it has been repeatedly held that proof of this additional element is necessary for conviction.

In the instant case the government in the presentation of its case at best proved that four counterfeit $100 bills were concealed under the floor-mat of an automobile owned and being operated at the time by defendant.

The question now before this court is whether or not this quantum of evidence is sufficient to formulate a prima facie case for a jury's consideration.

The Courts have held that in a prosecution for possessing counterfeit government obligations with intent to defraud, the government is required to prove accused's possession of the obligations and his intent to defraud therewith. *U.S.* v. *Companaro,* 63 F. Supp. 811; *U.S.* v. *Ruffino,* C.C.A. N.Y., 1933, 67 F. 2d 440; *U.S.* v. *Litberg,* C.A. Ill. 1949, 175 F. 2d 20, possession of (4) $5 counterfeit bills. Certainly, petitioner's intent may be inferred from his acts and it is a question of fact to be determined by the jury from all the circumstance of the case. *U.S.* v. *King,* C.A. Tenn. 1964, 326

F. 2d 415, but the question here is whether or not the naked act of having counterfeit bills concealed under a floormat in one's automobile is sufficient to permit a jury to infer the necessary intent to defraud? Although there appears to be no cases directly in point, they seem to indicate that such evidence is insufficient. See *U.S.* v. *Litberg*, C.A. Ill. 1949, 175 F. 2d 20; *U.S.* v. *Ruffino*, C.C.A. N.Y., 1933, 67 F. 2d 440; *U.S.* v. *Campanaro*, 63 F. Supp. 811 (1945); *U.S.* v. *Forzano*, 190 F. 2d 687 (2d Cir.); *U.S.* v. *Brown*, C.A., N.Y. 1965, 348 F. 2d 661; *Marson* v. *U.S.*, C.A. 6th Cir. Mich., 1953, 203 F. 2d 904; *Hagon* v. *U.S.*, C.C.A. Ohio, 1924, 295 F. 656.

If the law were to the effect that possession and concealment alone were enough to warrant submitting the case to the jury, many innocent persons would surely be imprisoned.

The intent to defraud is not included in all sections pertaining to counterfeiting. For example, "intent to defraud is not included in the sections forbidding the making of false United States Coins, 18 U.S.C., Sections 485, 490 or postage stamps, Section 501. The same thing holds true in Sections 474, 487, 488 and 509 which pertain to counterfeiting paraphernalia. The man who plated silver coins with gold, so they resembled gold coins of the same general size was guilty of counterfeiting even if he had no actual intent to defraud. *United States* v. *Russell*, 22 F. 390 (C.C. Mass. 1884). Congress evidently intended that the unlawful possession of such materials should be sufficient to warrant conviction, unless the accused could explain the possession to the satisfaction of the jury.

There are many circumstances under which persons might come into possession of counterfeits, either with-

out knowledge of their character or with such knowledge but without intent to use them fraudulently or unlawfully, as, for instance, the officers who took and held possession of the counterfeit bills, or for example one who collects them for study and education. In *United States* v. *Kelley,* 186 F. 2d 598 (7th Cir. 1951), the Court held that an intent to defraud may be inferred by a secret attempt to destroy a large roll of counterfeit bills. However, in the present case we have only the bare fact that the notes were under the floormat of petitioner's automobile. This allows the jury to infer that the accused knew the bills were counterfeit; that for this reason, he and not a third person concealed them and finally that he did this because he intended to defraud someone with these bills.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19849

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*

v.

LESTER CLIFFORD LEE, *Defendant-Appellant.*
APPEAL from United States District Court
for the Eastern District of Kentucky.

Decided and Filed June 24, 1970.

Before WEICK, PECK and BROOKS, Circuit Judges.

WEICK, Circuit Judge. Lee was convicted by a jury in the District Court on two counts of an indictment which charged him in the first count with transporting a firearm in interstate commerce after having been convicted of a crime punishable by more than one year, 15 U.S.C. § 902(e)[1], and in the third count with possessing and concealing counterfeit money with intent to defraud, 18 U.S.C. § 472. He was sentenced to five years on each count, to run concurrently, from which judgment he appeals.

While stationed in Okinawa, Japan, with the United States Air Force, Lee was convicted in 1949 of rape and sodomy by a General Court Martial of the Air Force, and was sentenced to a term in excess of one year, which sentence was subsequently served in military prisons.

During May, 1968, Area Supervisor Baker, of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Ser-

[1] 15 U.S.C. § 902 was repealed by Pub.L. 90-351, Title IV, § 906, 82 Stat. 234 (June 18, 1968). The same crimes are now punishable under 18 U.S.C. § 922(a)(1), (c), (e)-(i).

vice, received a tip from an informant that Lee would at some time in the future be traveling from Columbus, Ohio, through Cincinnati, on his way to North Carolina, and that he would be carrying with him a firearm. The informant told Supervisor Baker that he would contact him or another agent on the exact day of the trip. Supervisor Baker told the Investigators serving under him that they would receive a call from an informant, who would not identify himself but who would be reliable, and that he would give them information concerning Lee upon which they were to act.

At 10:15 a.m. of June 12, 1968, Special Investigator Stocking received a call in his Cincinnati office from the informant. Although Baker was present, neither he nor anyone else listened in on the conversation. The informant told Stocking that Lee had left Columbus approximately thirty minutes before, driving a 1968 Buick Electra two-door hardtop with brown bottom and light-colored top, bearing Ohio license number 30197. The informant said that Lee was accompanied by one, Tommy Stilson, also known as Tommy Tucker, and that they would make a stop in Dayton, Ohio, where he would pick up "four articles" before proceeding farther.

The United States Commissioner was not available when the call was received, and the nearest Commissioner was some distance away in Lexington, Kentucky. The agents did not believe that they had adequate time in which to secure a warrant.[2]

Surveillance was immediately set up on Interstate 75 which runs from Dayton to Cincinnati and into Kentucky. Supervisor Baker and Investigator Rowe observed the described car passing through Cincinnati at approximately one o'clock p.m. They followed the car into Kentucky where Investigator Stocking, in the company of Sergeant Pat Ryan of the Kenton County, Kentucky Police, also joined, following it in a police car. Sergeant Ryan turned on the siren and

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[2] The drive from Columbus to Cincinnati takes approximately two hours. Actually it took Lee approximately three and one-half hours on this occasion, because he stopped in Dayton on the way.

red light to signal Lee to the side of the road. When this occurred, a member of the Kentucky State Police who was traveling beside appellant in an unmarked car, observed the person on the passenger's side of the car, bend over. It was subsequently determined that Lee was driving and that Stilson was sitting on the passenger's side.

Investigators Rowe and Stocking immediately conducted a search of the trunk of the car which was owned by Lee. In the trunk they discovered among other things, a suitcase belonging to Lee which contained a loaded .38 caliber "Colt" revolver. Investigator Rowe searched the interior of the car and discovered four counterfeit $100-Federal Reserve Notes under the floormat on the passenger's side of the car.

Prior to and again during the trial a motion was made by Lee to suppress the use of the revolver and the counterfeit bills as evidence, which motion was denied. In a voir dire hearing on the motion, Supervisor Baker, who was the only person who knew the identity of the informant, testified that he (Baker) had told the investigators "to act upon the information because it would be reliable." Agent Baker did not testify that he had relied on this informant previously, or what the circumstances were which led him to believe that the information was credible.

The District Court ruled that Baker knew that the informant was reliable. The evidence was permitted to be introduced over the continuing objection of Lee.

The testimony of Robert Trowbridge was also admitted over objection. Trowbridge testified that he had previously owned the revolver and that it had been stolen from his sporting goods store on December 20, 1966.

Lee contends that he has not been convicted of a crime punishable by imprisonment for a term exceeding one year within the meaning of 15 U.S.C. § 902(e), which provides as follows:

> "It shall be unlawful for any person who is under indictment or who has been convicted of a crime punish-

able by imprisonment for a term exceeding one year or who is a fugitive from justice to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition."

He argues that a court martial is not part of the judicial branch of the Federal Government and therefore, judgments rendered by military tribunals are not within the contemplation of the statute. This contention is without merit.

The only case directly in point involved the defendant Lee.[3] *United States* v. *Lee*, 227 F.Supp. 450 (D.N.D., 1964), held that a court martial conviction does come within the meaning of 15 U.S.C. § 902. We see no reason to construe the statute differently than did the District Court in that case.

The language of the statute is not limited to judgments rendered by Article III courts. Courts martial are authorized under Article I of the Constitution. *Osborne* v. *United States*, 322 F.2d 835, 838-839 (5th Cir. 1963); *cf. United States ex real. Thompson* v. *Price*, 258 F.2d 918, 922 (3rd Cir. 1958), *cert. denied*, 358 U.S. 922.

In cases in which courts martial have jurisdiction, their judgments are to "be accorded the finality and conclusiveness as to the issues involved which attend the judgments of a civil court in a case of which it may legally take cognizance." *Grafton* v. *United States*, 206 U.S. 333, 345 (1907).

Jurisdiction of the military court is not challenged in this case. The finding of the court martial that Lee had committed a crime, and the judgment of sentence in excess of one year, are entitled to the conclusiveness of a judgment of an Article III court.

Gubbels v. *Hoy*, 261 F.2d 952 (9th Cir. 1958), relied on by Lee, does not dictate a result different from the one we have reached. That case is inapposite because its holding that a sentence of a court martial could not be the basis of de-

[3] The record does not disclose whether Lee was convicted in that case.

portation under 8 U.S.C. § 1251(a)(4), was based on the fact that administratively it is impossible for a court martial to comply with all the requirements of that Act. No such difficulty is present here. The military court has decided Lee's guilt and has rendered judgment. Lee stands "convicted of a crime punishable by imprisonment for a term exceeding one year...."

Lee argues that it was error for the District Court to deny his motion to sever Count I of the indictment, charging transportation of the firearm, from Count III of the indictment, charging possession of counterfeit money. Rule 8(a) of Federal Rules of Criminal Procedure permits joinder of separate offenses in an indictment if they "are based on the same act or transaction...." Rule 14, however, provides for severance of separate counts of an indictment where the defendant can demonstrate that prejudice will result from a joint trial.[4] The granting of a motion for severance under rule 14 is within the sound discretion of the trial judge and his ruling will not be reversed unless there is a showing of abuse of discretion. See, *e.g.*, *United States* v. *Vida*, 370 F.2d 759 (6th Cir. 1966); *cert. denied*, 387 U.S. 910 (1967); *Anderson* v. *United States*, 270 F.2d 124 (6th Cir. 1959).

Lee contends that he wanted to testify on the count charging possession of counterfeit money but not on the charge of interstate transportation of the firearm, which would have

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[4] Fed. R. Crim.P. 14 provides:

"If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial."

permitted the Government to cross-examine him concerning his previous conviction for rape and sodomy. The evidence of the previous conviction was not admissible with respect to Count III, and therefore he claims that he was prejudiced because he had to decided not to testify on Count III. We disagree with Lee's contention that the District Court abused its discretion in denying the motion for severance.

This case is not like the cases where the court held that it was an abuse of discretion not to grant a severance of trials of crimes arising out of totally separate transactions. See, *e.g., Drew* v. *United States,* 331 F.2d 85 (D.C. Cir. 1964). The crimes contained in the counts of the indictment here were not "clearly distinct in time, place and evidence." *Cross* v. *United States,* 335 F.2d 987, 989 (D.C. Cir. 1964). Both counts in the indictment were the result of a common occurrence, *i.e.,* the search of Lee's car after it crossed the Ohio-Kentucky border.

In addition to the fact of a common occurrence, the evidence in this case was uncomplicated and the jury, under proper instruction, would have no difficulty in considering the evidence only in connection with the crime of which it was probative. We note that there was no objection made to the form of the instructions given by the District Judge.

We find that there was no abuse of discretion in denying the motion under Rule 14.

Lee contends that it was prejudicial error to admit the testimony of Trowbridge that the revolver had been stolen from his gunshop approximately one and one-half years prior to its transportation in interstate commerce. The fact of the theft of the gun was not relevant to any of the allegations in the indictment. As we recently held: ". . . [I]t is a fact which is likely to induce the jury to speculate as to other bad acts which the accused may have committed." *United States* v. *Laker,* —— F.2d ——, —— (No. 20,028, 6th Cir. 1970).

Although introduction by the Government of such evidence was patently improper [5], nevertheless we are of the opinion that it was harmless error in the present case. *Harrington* v. *California*, 395 U.S. 250 (1969); *Chapman* v. *California*, 386 U.S. 18 (1967). See *United States* v. *Laker*, *supra*. The evidence adduced shows beyond a reasonable doubt that the federal agents observed Lee crossing state lines; that Lee made no stops in Kentucky prior to his arrest; and that Lee had possession of the gun when he was apprehended. The conclusion is inescapable that he had transported the gun in interstate commerce.

Lastly, Lee contends that there was no showing of probable cause upon which the warrantless arrest and incident search and seizure could be predicated.

The Fourth Amendment requires that arresting officers first obtain a warrant to make an arrest or search and seizure, and that a warrant will issue only upon a showing of probable cause. *Johnson* v. *United States*, 333 U.S. 10, 13-15 (1948). If circumstances require, a valid arrest without a warrant can be made if the arresting officer has probable cause to believe that a crime is being committed. A search and seizure incident to the arrest is valid. *E.g.*, *Draper* v. *United States*, 358 U.S. 307, 310-311 (1959).

An inquiry into the existence of probable cause is the same, whether made by a magistrate on application for a warrant or made by a court after an arrest or search and seizure without a warrant. See *Spinelli* v. *United States*, 393 U.S. 410, 417 n. 5 (1969). Where an informant supplies the basis for probable cause, the probative value of his report must be independently determined. 393 U.S. at 415; see *Aguilar* v. *Texas*, 378 U.S. 108, 114-115 (1964). The burden of showing probable cause is on the Government. *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951). In our opinion, the Gov-

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[5] It comes close to being misconduct of counsel and ought not to be tolerated by the court.

ernment has not carried its burden of producing adequate evidence from which the District Court could conclude that there was probable cause for an arrest in this case.

Beck v. *Ohio,* 379 U.S. 89 (1964), is instructive. In that case, police, without a warrant, arrested a known gambler upon the tip of an informant that he would be in a certain location at a certain time carrying on illegal gambling activities. *Id.* at 97-98 (dissenting opinion). A search of defendant's person led to the discovery of gambling slips. During a hearing on a motion to suppress, the arresting officer testified that he knew the informant, but he did not divulge the identity of the informant nor did he give any of the surrounding circumstances which would indicate the reliability of this information. In holding that there was no probable cause for the arrest, the Supreme Court distinguished *Draper* v. *United States, supra,* on the ground that in *Draper* the informant not only gave very specific information concerning the alleged illegal activity of the suspect, but the arresting officer testified that the informant had given reliable information on numerous occasions in the past. The Court said:

> "... [I]t was incumbent upon the prosecution to show with considerably more specificity than was shown in this case what the informer actually said, and why the officer thought the information was credible." 379 U.S. at 97.

In the instant case there was no showing that the informant was known to be reliable. Supervisor Baker did not testify that he had been given reliable information in the past by this informant, nor did he testify as to the circumstances of such information so that his conclusions could be evaluated by the Court. See *Jones* v. *United States,* 362 U.S. 257, 271 (1960); *Draper* v. *United States, supra* at 309; *United States* v. *Barnett,* 407 F.2d 1114, 1116 (6th Cir. 1969), *cert. denied,* 395 U.S. 907; *United States* v. *Freeman,* 382 F.2d 272, 273 (6th Cir. 1967).

All that Supervisor Baker testified was that he knew the informant and that he had told the investigators to act on any information which the informer gave them because it would be reliable. This is clearly not an adequate basis from which the Court could conclude that there was probable cause. See *Beck* v. *Ohio,* supra at 94; *Aguilar* v. *Texas, supra* at 109.

Nor does the fact that the information given by the informant in this case turned out to be accurate, establish probable cause. In *Spinelli* v. *United States, supra,* the defendant, a known gambler under surveillance by the FBI, had been observed entering a certain apartment which had two telephone numbers. A tip was received from an informant that the defendant was using two telephones with certain numbers in a certain apartment for disseminating wagering information. The Court held that there was no probable cause, because his travels to and from this apartment and the existence of the two telephones could not be taken as "bespeaking gambling activity . . . ." 393 U.S. at 414.

In the present case it is clear that if there had been no tip from the informant, who was not shown to be reliable, there was no activity which would bespeak illegal conduct. The fact of Lee's driving a car from Ohio to Kentucky with another man, is innocuous. If, of course, the informant was demonstrably entitled to be credited, then the fact that he was able to report the name of the passenger, the license number and description of the automobile, along with the time of departure, plus the stopover in Dayton (which is slightly out of the way if one is traveling from Columbus to Cincinnati), would have given the agents probable cause to believe that the information that Lee was carrying a gun was accurate and that he was, therefore, engaged in violating the law. *United States* v. *Barnett, supra.* On remand, the Government will have an opportunity to offer proof as to the reliability of the informant.

During pendency of this appeal, a motion for a new trial on newly discovered evidence was filed in the District Court,

and an order was entered by the Court determining that the Court was without authority to pass on it since an appeal had been taken. The Court directed the Clerk of the District Court to forward to the Court of Appeals a copy of the motion.

The District Court erred in ruling that it was without jurisdiction to pass on the motion. It had jurisdiction to hear the motion and to deny it. If the District Court was of the view that the motion should be granted, it should have applied to this Court for an order of remand for that purpose. *United States* v. *West*, 170 F.Supp. 200 (N.D. Ohio, 1959), and cases cited therein under Rule 33 Fed.R.Crim.P., *aff'd* 274 F.2d 885 (6th Cir. 1960), *cert. denied*, 365 U.S. 811 (1961), *rehearing denied*, 365 U.S. 875. The motion can be considered on remand.

Because we find no reversible error in the trial itself, justice would not be served by reversing the judgment and granting a new trial. *Cf.*, *Jackson* v. *Denno*, 378 U.S. 368, 394 (1964); *United States* v. *Lloyd*, 400 F.2d 414 (6th Cir. 1968).

We remand with instruction to the District Court to conduct a hearing consistent with this opinion to determine whether probable cause for the arrest existed, and to hear and determine the motion for a new trial on newly discovered evidence. The District Court shall report to us its findings on the issue of probable cause for the arrest, and we reserve jurisdiction to consider them.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

NO. 10,670

UNITED STATES OF AMERICA, PLAINTIFF

v.

LESTER CLIFFORD LEE, DEFENDANT

Memorandum

The indictment is this case was returned on September 16, 1968. The defendant, with his counsel, appeared before the court, was formally arraigned and entered a plea of not guilty to all counts in the indictment. On September 18, 1968, the case was assigned for hearing on all preliminary motions for October 1, 1968, at 1:00 P.M. The case was assigned for trial for Thursday, November 21, 1968, at 9:00 A.M. On October 1, 1968, the court overruled preliminary motions pending at that time. On November 21, 1968, all other preliminary motions then pending were ruled upon by the court. On November 21, 1968, the case was called for trial pursuant to order. The defendant failed to appear. On December 11, 1968, on motion of the defendant, the case was continued until the first day of the March, 1969 session of the court. By order of March 7, 1969, the case was reassigned for jury trial on March 24, 1969, at 10:00 A.M.

The trial of the defendant on the charges contained in the indictment began on March 24, 1969, and was concluded with a verdict of guilty on two counts on March 25, 1969. A judgment of sentence was filed on March 25, 1969. A notice of appeal was filed on the same day. The appeal was duly prosecuted and on June 24, 1970, the United States Court of Appeals for the Sixth Circuit handed down an opinion in which it stated, "Because we find no reversible

error in the trial itself, justice would not be served by reversing the judgment and granting a new trial."

The opinion of the Court of Appeals also contained the following statement: "During pendency of this appeal, a motion for a new trial on newly discovered evidence was filed in the District Court, and an order was entered by the Court determining that the Court was without authority to pass on it since an appeal had been taken. The Court directed the Clerk of the District Court to forward to the Court of Appeals a copy of the motion."

The appellate court further said, "The District Court erred in ruling that it was without jurisdiction to pass on the motion. It had jurisdiction to hear the motion and to deny it. If the District Court was of the view that the motion should be granted, it should have applied to this Court for an order of remand for that purpose." The opinion then contains a number of citations of authority. The Court then said, "The motion can be considered on remand."

The opinion of the Court of Appeals concluded with the following paragraph:

> "We remand with instructions to the District Court to conduct a hearing consistent with this opinion to determine whether probable cause for the arrest existed, and to hear and determine the motion for a new trial on newly discovered evidence. The District Court shall report to us its findings on the issue of probable cause for the arrest, and we reserve jurisdiction to consider them."

The appellate court's opinion of June 24, 1970, was filed in this court on July 16, 1970. The case was immediately set down for oral hearing for Monday, July 20, 1970, at 1:30 P.M. On that date, on motion of the defendant, Lester Clifford Lee, and for good cause shown it was ordered that the hearing should be continued until September 8, 1970, at 1:00 P.M.

On September 8, 1970, by order of court and upon agreement of the parties, a hearing was held pursuant to the directive contained in the opinion of the Court of Appeals. Numerous witnesses were called and upon the conclusion of the hearing the court directed that the transcript of the evidence be made at the cost of the United States. It was further directed that as soon as the record was filed each side would have 10 days to file any statements that it wanted to file. It was further directed that the defendant would be given 10 days from the date of the filing of the record to file any brief that he desired to file and the United States would be given 10 days thereafter. It was expressly stated by the court that there was no commitment on the part of the court to hear any oral arguments.

On February 24, 1971, the reporter filed the transcript of the evidence offered at the hearing. Neither the defendant nor the United States filed statements or briefs within the 10 day period following the filing of the transcript on February 24, 1971.

On March 23, 1971, the United States filed a motion and a memorandum. On March 31, 1971, the undersigned judge of this court received a letter dated March 29, 1971, from Mr. David K. Purkey, attorney of record for the defendant, Lester Clifford Lee, in which it is recited that the defendant waives his right to file any further memorandum. A copy of the letter is attached hereto and made a part hereof.

The court is of the opinion that there was probable cause in the knowledge of the arresting officers to stop the car and make the search described in the proof. Mr. Carl Baker, Area Supervisor with the Alcohol, Tobacco and Firearms Division of the U. S. Treasury Department, testified that he received information that the defendant Lee was a convicted felon and suspected of murder in Dayton, Ohio. He was also informed that there was another man who was dealing in firearms in Columbus, Ohio. These leads were checked and found by Mr. Baker to be correct. The infor-

mant was checked as to his employment, credibility and reputation and it was ascertained that he was of good reputation and could be relied upon to tell the truth. The information as to the automobile which the defendant was driving was obtained by a telephone call to the office of the Agents. The telephone was answered by Mr. John Stocking, Special Investigator for the Alcohol, Tobacco and Firearms Division, and it was he who actually received the telephone call on June 12, 1968, from the informant. He passed this on to Mr. Baker who was in the office at the time. The information which was delivered by the informant to Mr. Stocking over the telephone was that the defendant, Lester Lee, and another man, either Tommy Stilson or Tommy Tucker, had left Columbus in a 1968 Buick, golden brown in color on the bottom and a light color top, bearing a 1968 Ohio license plate, No. 30197. He also reported that these men had four objects with them, which were found upon the search to be four counterfeit $100 bills.

The evidence clearly brings the case within the rule that a federal agent may rely upon an informer whose information the agent has always found to be accurate and reliable. Draper v. U. S., 358 U.S. 307; Spinelli v. U. S., 393 U.S. 410; Aguilar v. Texas, 378 U.S. 108.

The proof falls far short of sustaining the claim that the defendant was arrested because of information received from electronic surveillance, that is the tapping of his telephone wires. The defendant has the burden of going forward with specific evidence demonstrating that his conviction was tainted by the use of illegally obtained evidence. There is not even a reasonable suggestion of any such practice in this case so far as the record discloses.

The motion for a new trial should be overruled. "The granting or refusal of a motion for a new trial upon the ground of newly discovered evidence rests in the sound discretion of the trial court and a new trial will not be granted unless such evidence would probably bring about a

different result. In the absence of a clear showing of abuse of discretion in determining the probable effect of the newly discovered evidence in changing the result of the trial, the action of the district judge in overruling the motion for a new trial will not be disturbed on appeal." U. S. v. Crowder, 351 F. 2d 101. An order in conformity with the rulings of this court is this day entered.

MAC SWINFORD, *Judge*

April 1, 1971

A True Copy Attest:

Davis T. McGarvey, Clerk
U. S. District Court
By Dorothy D. Wald, D. C.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19849

UNITED STATES OF AMERICA, *Plaintiff-Appellee*

v.

LESTER CLIFFORD LEE, *Defendant-Appellant.*

ON APPEAL from the United States District Court for the Eastern District of Kentucky.

Decided and Filed September 14, 1971.

Before: WEICK, PECK and BROOKS, Circuit Judges.

PER CURIAM. Upon consideration of the original appeal of Lee's conviction, 428 F.2d 917 (6th Cir. 1970), we remanded with a direction to the District Court to obtain more information about the reliability of the informer whose information had led the Alcohol, Tobacco and Firearms Division of the Treasury Department to stop appellant's car.

It was in transit from Ohio to North Carolina, and the agents had found both an illegally possessed gun and four counterfeit $100 bills in the car.

On the remand, the court held a hearing in which Carl Baker, Area Supervisor of the Division, testified that he had checked the informant's background and found him to have a good reputation. Moreover, information apparently unrelated to the present case which the informant had given concerning trafficking in machine guns had been determined to be accurate by Mr. Baker sometime prior to appellant's arrest. This was sufficient to prove the reliability of the informant, and to justify the District Court's determination that the telephoned tip to the Division constituted probable cause for Lee's arrest. *Cf. Aguilar* v. *Texas,* 378 U.S. 108 (1964); *Draper* v. *United States,* 358 U.S. 307 (1959).

Appellant further contends that the denial of a motion for a new trial based upon purportedly newly discovered evidence constituted an abuse of discretion on the part of the trial court. In support of this motion appellant alleges that the facts which the informant supplied to the Division were obtained through an illegal wiretap. During the hearing on remand, the defense brought forth two witnesses who testified only that a telephone worker, Spires, had told them that he had tapped the phone of a "Lee," and had been told that the tap led to "Lee's" arrest. Spires refused to testify to any such conversation, pleading the Fifth Amendment protection against self-incrimination. Defense counsel did not call to the stand any of those for whom Spires had supposedly placed the tap, although they were supposedly known and were not shown to be unavailable. In the light of this unsubstantial and fragmentary evidence which scarcely connected the wiretap (if one occurred) to this defendant, we cannot say that the District Court's refusal to order a new trial was an abuse of discretion.

Affirmed.